Patterson Oil Terminals, Inc., v. The Port Covington, 205 F. (2d) 694 9, 11

Publicker Commercial Alcohol Co. v. Independent Zoning Co., 165 F. (2d) 1002 10

Publicker Industries, Inc., v. Tugboat Neptune Co. (The Wm. J. Worth), 171 F. (2d) 48 9, 10

Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 12

Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Brothers Construction Co., 228 U.S. 177 7

Steamer Syracuse, The, 12 Wall. 167 5, 7, 8

Sturgis v. Boyer, 24 How. 110 3

Sun Oil Co. v. Dalzell Towing Co., Inc., 287 U.S. 291 7, 8

Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 11

Ten Eyck v. Director General of Railroads, 267 Fed. 974 7

TEXTBOOKS.

Restatement of Torts, sec. 413 (vol. 2, pp. 1118-1119) 3

Restatement of Torts, sec. 416 (vol. 2, p. 1128) 4

Supreme Court of the United States.

OCTOBER TERM, 1953.

No. 754.

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS,"

Petitioner,

v.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

I. Discussion of "Question Presented."

The petition (on page 2) suggests that the only "question presented" in this case is whether an inert tow, wholly under the direction and control of the towing vessel, can be liable directly to the owners of a third vessel with which the tow collided, "solely by reason of a contract" between

the tug and tow providing in substance that the towing was to be done at the sole risk of the tow, that the owner of the tow would indemnify the owner of the tug for damages to such third vessel, and that the master of the tug was the agent of the owner of the tow.

While that is the only question here raised by petitioner, respondents contended in the District Court, and again in the Court of Appeals, that petitioner, as owner of the tow, was itself negligent, not *solely* by reason of the *legal consequences* of the contract, but because it had itself failed in its own primary duty to "stranger" vessels which might be encountered in the course of the towing operation, and was therefore liable by reason of the *factual* situation arising out of the *arrangements* which were made for the towing voyage, as *evidenced by* the contract. On such approach it is unnecessary to consider at all whether the particular terms of this towage contract are valid or invalid in law as between the parties to it.

The letter from the tower to petitioner and the attached Standard Towing Conditions (Libelant's Exhibit 1; R. App. 1-3) show what the tower and petitioner, as owner of the towed vessel, understood would be *in fact* the method of handling the towed vessel. The tower was "only . . . to provide motive power" (R. App. 3), and to "supply the necessary personnel for handling the vessels through the Cape Cod Canal" (R. App. 2). Petitioner therefore knew that the tower would not undertake to provide any crew for the tow, the absence of which was specifically found as a fault *of the tow* by the District Judge (R. App. 14, 16). Appellant further knew that whatever the tower might do about lighting the tow would be merely a gratuitous undertaking; and failure to have proper lights on the tow was also specifically found as a fault *of the tow* by the District Judge (R. App. 14, 16). Petitioner thus has direct complicity in these defects and resulting faults.

Both courts below chose to rest their respective but consistent decisions [1] primarily on the contract; but we still submit that the obligations of petitioner also rest upon it by reason of the understanding reached between it and the tower as to the *factual* allocation of responsibility as shown by the language of the Standard Towing Conditions.

Had petitioner undertaken this towing operation through an independent tower, without special towing conditions delineating the respective areas of responsibility of each, petitioner might have relied upon the obligation of the independent contractor to take all necessary precautions under the rule of *Sturgis* v. *Boyer*, 24 How. 110. Here, however, petitioner *in fact* had relieved the tower of what would otherwise have been the tower's responsibility. Having made no provision, express or implied, that the tower should take the necessary precautions, and having made no effort itself to do so or to see that those precautions were taken by others, petitioner is itself directly liable for harm caused by the proper precautions not having been taken by anybody.

The rule of law is thus stated in the Restatement of Torts, sec. 413 (vol. 2, pp. 1118-1119):

> "§ 413. Duty to Provide for the Taking of Precautions against Dangerous Conditions Involved in Work Entrusted to Contractor.
>
> "One who employs an independent contractor to do work which the employer should recognize as necessarily creating, during its progress, conditions containing an unreasonable risk of bodily harm to others unless special precautions are taken, is subject to

[1] The decision of the District Court was affirmed by the Court of Appeals and a petition to that court for rehearing was denied. Judge Coxe in the Southern District of New York independently reached an entirely harmonious result (94 F. Supp. 520).

liability for bodily harm caused to them by the absence of such precautions, if the employer

"(a) fails to provide in the contract that the contractor shall take such precautions (as to which see § 416), or

"(b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions."

This is similar to the rule of law stated in section 416 of that Restatement (vol. 2, p. 1128) as follows:

"§ 416. WORK DANGEROUS IN ABSENCE OF SPECIAL PRECAUTIONS.

"One who employs an independent contractor to do work, which the employer should recognize as necessarily requiring the creation during its progress of a condition involving a peculiar risk of bodily harm to others unless special precautions are taken, is subject to liability for bodily harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions."

Petitioner's situation is squarely within the principles of legal liability above quoted. The outcome below can and should be sustained on that ground alone.[2]

II. Discussion of Aspects of the Contract.

The provisions of the towage contract and their application to the facts of this case fall into two distinct categories, as follows:

[2] On such basis of decision, the questions of validity of the contract and of respondents' right to a decree against petitioner become moot.

(*a*) Those provisions whereby petitioner voluntarily agreed to accept all risk of loss or damage, not only to the tow but to the property of third parties, and petitioner's agreement that the master and crew of the tug should become the servants of the towed vessel; and

(*b*) The additional provision that petitioner would indemnify the tug and her owner "against all such damages, injuries, losses and delays, and against all claims in respect thereof."

The provisions referred to in sub-paragraph (*a*), *supra*, underlie petitioner's contention that this particular towage contract is invalid as between petitioner and tower. The provision referred to in sub-paragraph (*b*), *supra*, is that upon which petitioner predicates its contention that (even if the contract is valid) respondents, as injured third parties, cannot have direct rights of redress against petitioner rather than circuitously through the tower.

III. Argument.

1. The Contract is Not Invalid as between the Parties.[3]

In support of its contention that the contract is invalid, even as between the parties, petitioner relies[4] primarily upon two decisions of this Court: *The Steamer Syracuse*, 12 Wall. 167, and *Compañia de Navigacion Interior, S.A.*, v. *Fireman's Fund Insurance Co.*, 277 U.S. 66 (hereinafter referred to as *Wash Gray*).

Syracuse involved a towage contract wherein it was provided that the vessel in tow was to be towed "at the risk of her master and owner" (p. 169). This Court said (p. 171):

---

[3] Sub-paragraph (*a*), *supra*.

[4] Petition, p. 7.

> ". . . if it be true . . . that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

The Court went on to hold that the *towing vessel* was not relieved from liability for *its failure* to exercise reasonable care in handling of the flotilla.

In *Wash Gray* the contract provided that, except for the towing hawser, which was to be furnished by the towing vessel, "All other risk and expense [were] to be borne by the tug" (the "tug" in this instance was the Wash Gray, *the vessel towed*), and that the *towing vessel* "is not responsible in any way for loss or damage to the Wash Gray." This Court there held that the contract did not violate a stipulation in the policy of insurance on the Wash Gray that the insurance should be void if her owner entered into any agreement "whereby any right of recovery of the insured [Wash Gray] against any vessel, person or corporation is released, decreased, transferred or lost . . ." (p. 73). The reason for the holding was that the agreement entered into between the tow and the tower did not relieve *the tower* from liability *for its own negligence*.

In neither of those two decisions did this Court clearly state whether the contract was (1) invalid as violating public policy or (2) merely insufficient by its terms to "release" the tug from liability for its own negligence; but

the Second Circuit has interpreted the decision in *Syracuse* to mean that the "release" language of the towing agreement had not been intended by the parties to include release of the tug from the consequences of its own negligence. *The Oceanica*, 170 Fed. 893 (certiorari denied, 215 U.S. 599). *Ten Eyck* v. *Director General of Railroads*, 267 Fed. 974.

There is nothing in *Syracuse* or *Wash Gray* which requires a conclusion that this Court was there announcing as a rule of public policy that a tower may not exonerate itself by contract from liability for the negligence of its servants. A towing vessel is clearly not a common carrier. *Syracuse* language quoted *supra*. *The "Margaret,"* 94 U.S. 494. Consequently a tower is not subject to the special limitations on freedom of contract which apply to that type of calling. We know of no rule or reason why the contract in the case at bar, which so clearly expresses the intention that the tow should assume *all liability*, including that flowing from the negligence of the master and crew of the tug, should be invalid. As this Court said in *Santa Fe, Prescott & Phoenix Railway Co.* v. *Grant Brothers Construction Co.*, 228 U.S. 177 (a case where the railroad was not transporting as a common carrier), at p. 188:

> "There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, *the highest public policy is found in the enforcement of the contract which was actually made.*" (Emphasis supplied.)

In *Sun Oil Co.* v. *Dalzell Towing Co., Inc.*,[5] 287 U.S. 291, this Court held that a contract for docking a ship with towboat assistance, which contract contained the now

[5] Cited by petitioner (Petition, p. 6).

familiar "pilotage clause,"[6] was valid, and that the shipowner could not recover against the supplier of the tugs for damage caused by the negligence of the tug captain while on the ship acting as docking pilot.

The conclusion is inescapable that this Court in *Syracuse* and *Wash Gray* refused to relieve the towing vessel from liability for the negligence of her personnel because the contract in each instance did not demonstrate with clarity and directness that such a result was intended by the parties. On the other hand, in the *Sun Oil Co.* case it was clear that the docking pilot was to be "the servant of the ship," and consequently that his negligence was to be that of the ship. So also in *Bisso, Receiver,* v. *Inland Waterways Corp.* (211 F. (2d) 401; 1954 A.M.C. 648), the Court of Appeals for the Fifth Circuit sustained the validity of a contract which clearly and unequivocally expressed the intention that the tow would assume responsibility for the negligence of the master and crew of the towing vessel.

There is no room here even to imagine that the parties did not intend that the owner of the tow should be responsible for the negligence of the master and crew of the tug. The Standard Towing Conditions provide that the tug services will be supplied "at the sole risk of such [towed] vessel or craft and of the owners, charterers or operators thereof . . ." (R. App. 2). If this were all, the case might fall within the limitations imposed by *Syracuse* and *Wash Gray*. But the agreement continues: "that the Master and crew of such tug or tugs used in the said services become the servants of and identified with such vessel or craft and their owners, and that the Tug Company only undertakes to provide motive power" (R. App. 2, 3), and further that "The Tug Company will not be responsible

[6] Whereunder a tug master, who boarded the ship and directed her navigation, became the servant of the ship so that the ship was responsible for his negligence.

for the acts or defaults of the Master, or crew of such tug or tugs . . . nor for any damages, injuries, losses or delays from whatsoever cause arising that may occur either to such vessel or craft, . . . or to any other ship or vessel or property of any kind . . ."

Plainly, then, the agreement before us spells out that, as between the parties, the negligence of the master and crew of the tug is that of the owner of the tow. Neither the dictates of public policy nor any possible ambiguity as to the intent of the parties to the contract can afford petitioner any comfort here.

2. THERE IS NO BARRIER TO GIVING DIRECT EFFECT TO THE PROVISIONS OF THE CONTRACT IN A SUIT IN ADMIRALTY BY AN INJURED THIRD PARTY AGAINST THE OWNER OF THE TOWED VESSEL.[7]

Petitioner asserts (Petition, p. 10) that the decision in the Fourth Circuit in the instant case is in conflict with two decisions in the Third Circuit[8] and one decision in the New York (State) Court of Appeals.[9]

In each of those three cases the *tug owner* was asserting his "pilotage clause" contract as a shield against liability to a third person for the negligence of an individual who was found, as a matter of fact, to be performing the tug owner's own work; and in each of them the injured party insisted that the tug owner-employer could not escape liability on agency principles by calling his servant something which in fact he was not. None of those cases holds

---

[7] Sub-paragraph (*b*), *supra*, p. 5.

[8] *Publicker Industries, Inc.*, v. *Tugboat Neptune Co.* (*The William J. Worth*), 171 F. (2d) 48. *Patterson Oil Terminals, Inc.*, v. *The Port Covington*, 205 F. (2d) 694.

[9] *Brenta II—Robins Drydock & Repair Co.* v. *Navigazione Libera Triestine, S.A.*, 261 N.Y. 455 (certiorari denied, 290 U.S. 656).

either that an injured third party may not look to either party to such an agreement who, by the terms of the contract, is himself responsible for seeing that due care is exercised, or that a party to such a contract may disclaim it, after damage has been done, to gain a shield against third party liability. As was said by the Court of Appeals here (R. p. 47):

> "The contract was deliberately assumed and it would be unconscionable for the owner of the tow to repudiate it after the accident occurred."

Moreover, both *William J. Worth* and *Brenta II* (in the New York State Court) involved actions at law. The courts were there dealing with situations presented under common law and code practice, and did not have available the broader equitable features of admiralty procedure and the characteristic ability of the Admiralty Court to meet new situations by molding practice to accommodate results equitably to be desired.

Furthermore, in *William J. Worth* liability was visited upon the respondents there because the negligence of the tug master occurred before he undertook the undocking operation.[10] No defendant operator of the assisted ship remained in the case. The United States, as owner, was never a party, and American-Hawaiian Steamship Company, general agent for the Government, had been removed from the case (165 F. (2d) 1002) on the authority of *Caldarola* v. *Eckert*, 332 U.S. 155. In *Brenta II*, the damages were ultimately visited upon the ship owner by the Second Circuit in an admiralty proceeding based on the

[10] "Both Captain Marvel of the Neptune and Captain Cooper of the Triton were thus rightly found to have been guilty of negligence in proceeding with the undocking operation before ever the former boarded the Worth and undertook to direct that operation." 171 F. (2d) 48, 49.

indemnity feature of the "pilotage clause" contract (92 F. (2d) 37). The United States Court of Appeals there pointed out that no cross-answers, necessary to the determination of the ultimate liability between the defendants, were filed at law in the State Court, and that such issue was never adjudicated.

In *Patterson Oil Terminals, Inc.*, v. *The Port Covington* the Court of Appeals, in affirming the refusal of the District Court to consider the effect of the "pilotage clause" as between the tug owner and the owner of the assisted vessel, did so (in the language quoted on page 11 of the petition) solely on the state of the pleadings, and because of the failure of the tug owner to file a cross-libel or make a proper cross-claim against the owner of the tow. While the views of the Third Circuit in that case seem to confine admiralty pleading requirements within limits which are more familiar to common law than to admiralty practice, that decision affords no basis for review of the decision here.

Courts of admiralty characteristically look to substance rather than to form, and to the equities of a given situation. This Court has recently characterized the admiralty as "a legal system that has been so responsive to the practicalities of maritime commerce and so inventive in adapting its jurisdiction to the needs of that commerce." *Swift & Company Packers* v. *Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 691. Avoidance of circuity of action is a desired equitable result, and, as was aptly stated by the Court of Appeals in the instant case (R. p. 48), quoting Judge Learned Hand in *The Kookaburra*, 69 F. (2d) 71, 73, "the admiralty, whose procedure is especially plastic, can skip the by-ways and head direct for the goal."

Petitioner also asserts (Petition, pp. 14, 15) that the decision of the Court of Appeals in this case is in direct con-

flict with the decision of this Court in *Robins Dry Dock & Repair Company* v. *Flint*, 275 U.S. 303.

It appears to us that the *Robins* case,[11] involving as it does a third-party *contractual* situation, is inapposite and not germane to any issue presented here. The cross-libel by these respondents (as owners of the Winding Gulf) against petitioner was not in any sense based upon breach of contract. Their claim here is for a maritime tort; and the contract between petitioner and the tower is material only in fixing the limits within which petitioner assumed the obligation to exercise due care during the towage from Nova Scotia to Baltimore. There is no claim here (as there was in the *Robins* and *Isbrandtsen* cases) by a stranger to a contract based upon the failure of one of the contracting parties to perform its commitments *to the other contracting party*. The courts below in this case did not, as petitioner seems to argue, make petitioner's liability depend upon its failure to fulfill its obligations to the tower. All that they did was to regard the contract as the measure of responsibility, and to give direct effect to the obligations which petitioner had retained or assumed.

IV. Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

CHARLES S. BOLSTER,

SEYMOUR P. EDGERTON,

Proctors for Respondents.

---

[11] Also *Isbrandtsen Co., Inc.*, v. *Local 1291, &c.*, 204 F. (2d) 495 (Third Circuit).

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
AUG 6 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 70.

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS,"
Petitioner,

v.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,
Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

CHARLES S. BOLSTER,
SEYMOUR P. EDGERTON,
Proctors for Respondents.

BINGHAM, DANA & GOULD,
1 Federal Street,
Boston, Mass.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Table of Authorities Cited.

Cases.

Alaska Commercial Co. v. Williams, 128 Fed. 362 4*n*.

Mylroie v. British Columbia Mills Tug & Barge Co., 268 Fed. 449 (1920); affirmed, 259 U.S. 1 (1922) 3

Santa Fe &c. Railway Co. v. Grant Brothers Construction Co., 228 U.S. 177 (1913) 3

Sun Oil Co. v. Dalzell Towing Co., Inc., 287 U.S. 291 (1932) 3

Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 70.

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS,"

Petitioner,

v.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Respondents file this supplemental brief only because of statements made by the Solicitor General in his "Memorandum for the Respondent" on Petition for Writ of Certiorari in *Bisso* v. *Inland Waterways Corp.*, No. 50, and in

his Petition for Writ of Certiorari in *United States* v. *Nielson et al.*, No. 210, both of which matters are now pending in this Court.

In the *Bisso* case (No. 50) the Solicitor General states at pages 2 and 3 of his memorandum:

> "Together, these three cases present the issue of the validity and effect of the disputed clauses in actions (1) by the tow against the tug, (2) by a third party against the tow, and (3) by the tug against the tow. It may be noted that the United States is peculiarly affected by the confusion which exists in this area, as exemplified by the opposite views which it represented below in *Neilson* (the tow) and the instant case (the tug)."

In the *Nielson* case (No. 210) he states at page 5 of his petition: "There are now pending in this Court petitions for writs of certiorari in two other cases involving similar exculpatory clauses: *Bisso* v. *Inland Waterways Corp.*, No. 50, and *Boston Metals Co.* v. *S. S. Winding Gulf*, No. 70." He further states at page 13 that, as pointed out in his Memorandum in the *Bisso* case, these "three 'pilotage clause' cases which will be before the Court present the issues of the validity and effect of these provisions in actions (1) by the tow against the tug (the *Bisso* case), (2) by a third party against the tow (*Boston Metals Co.* v. *S. S. Winding Gulf*, No. 70), and (3) by the tug against the tow (the instant [*Nielson*] case). The Court thus has the opportunity to render at this term definitive rulings in the three situations which form the great bulk of those involving the widely used 'pilotage clause'."

The above-quoted statements of the Solicitor General are extravagant and misleading.

The *Nielson* case (No. 210) is the only one of the three which involves exculpatory language in the form commonly referred to as the "pilotage clause." The *Bisso* case (No. 50) and this case (No. 70) involve exculpatory language in two *different* types of towage agreement, each covering a particular towage undertaking. Neither the *Bisso* case nor this case involves directly that language in a towage agreement which constitutes the so-called "pilotage clause."

This case (No. 70) differs from most of the earlier cases in that it involves a contract which is clear and unambiguous. In many of the older cases the towage contracts were of doubtful purpose. There can be no reasonable doubt as to what was intended by the parties here.

Moreover, the decision of the Fourth Circuit in this case and the decision of the Fifth Circuit in the *Bisso* case are entirely consistent *inter se* and with this Court's pronouncements in *Sun Oil Co.* v. *Dalzell Towing Co., Inc.*,[1] and in *Santa Fe &c. Railway Co.* v. *Grant Brothers Construction Co.*,[2] cited on page 7 of our brief in opposition to the petition.

In his petition in the *Nielson* case (No. 210) the Solicitor General argues (as petitioner argues here) that the decision of the Ninth Circuit in the *Mylroie* case [3] has "never been erased" (*Nielson* petition, p. 10) and is in conflict with the Second Circuit and possibly other circuits; but the *Mylroie* case involved primarily the construction of an equivocal contract and was decided ten years before *Sun Oil Co.* v. *Dalzell Towing Co.*, which latter decision certainly "erased" any elements of the *Mylroie* decision which may have indicated that, at least in the Ninth Cir-

---

[1] 287 U.S. 291 (1932).

[2] 228 U.S. 177 (1913).

[3] *Mylroie* v. *British Columbia Mills Tug & Barge Co.*, 268 Fed. 449 (1920); affirmed, 259 U.S. 1 (1922).

cuit, a tower could not contract against his own negligence.[4]

The mere fact that there are two other contemporaneous cases involving questions which, while remotely allied with, are not proximately similar to the issues involved in this case affords no basis for granting certiorari here.

The Solicitor General's complaint voiced at page 3 of his memorandum in the *Bisso* case (quoted *supra*) that he was obliged to represent "opposite views" in that case and in the *Nielson* case is irrelevant. In one case (*Bisso*) he represented the tug; in the other (*Nielson*) he represented the tow. Like many another lawyer, his duties occasionally require him to advocate opposite views.

The petition herein should be granted or denied on the particular qualifications of this case for review. We pointed out in our brief why the petition should be denied. The Solicitor General has advanced no pertinent reason why it should be granted.

Respectfully submitted,

CHARLES S. BOLSTER,

SEYMOUR P. EDGERTON,

Proctors for Respondents.

---

[4] The case of *Alaska Commercial Co.* v. *Williams*, 128 Fed. 362, also cited by the Solicitor General on page 7 of his petition in the *Nielson* case and in the footnote on page 2 of his memorandum in the *Bisso* case, was decided in 1904 and involved primarily procedural questions. In any event, it is not in point on the issues here or even on those presented in the *Nielson* case.